Committee on Resources
Subcommittee on Energy & Mineral Resources

Witness Statement

PROPOSED FEDERAL MINING POLICY CHANGES AND THEIR EFFECT ON THE MINING INDUSTRY AND ON STATE AND LOCAL REVENUES

Statement of
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1. Introduction and Summary.

I am a partner in the law firm of Stoel Rives LLP, with over 270 attorneys and offices in Portland, Oregon; Seattle, Washington; Boise, Idaho; Salt Lake City, Utah; and Washington, D.C. My practice involves counseling mining, oil and gas and energy companies with operations in the United States and elsewhere. In addition to assisting with mergers, acquisitions and joint ventures among mining companies, I have substantial experience counseling mining companies about the location and maintenance of mining claims on federal land and the acquisition of federal, state and local permits to explore for and to mine minerals on public lands. In addition to my law degree, I hold an A.B. degree in geology from Princeton University and a Master of Arts in Teaching (earth science) from the University of Chicago. A résumé listing other honors and publications is attached.

Stoel Rives has worked with many mining companies and participates in the activities of the Northwest Mining Association and the Rocky Mountain Mineral Law Foundation. In particular, Stoel Rives has assisted Crown Resources Corporation with various corporate and securities law issues. However, we have not been responsible for handling the mining law or permitting issues on the Crown Jewel Project in this state. My testimony today is not on behalf of any client or organization. The views offered today are my own and should not be ascribed to any client of Stoel Rives.

I have studied the Solicitor's Opinion titled "Limitations on Patenting Millsites Under the Mining Law of 1872," dated November 7, 1997, and the Crown Jewel Decision by the Secretaries of Interior and Agriculture dated March 25, 1999, denying approval of the plan of operations for the Crown Jewel Mine. These actions are part of an ongoing effort by Secretary Babbitt and Solicitor Leshy to frustrate and subvert, rather than administer and enforce, the mining laws passed by Congress. These actions are contrary to the laws enacted by Congress, as long interpreted by the courts and the Department of the Interior, and are bad mineral policy. Congress should repudiate the Solicitor's Opinion and should support mineral

exploration and development on public lands.

2. The Solicitor's Opinion Is Contrary to the Language, History and Purpose of the Mining Law.

This Subcommittee has received well-reasoned briefs on this subject from R. Timothy McCrum and Stephen D. Alfers on August 3 and June 15, respectively. Their points are summarized here without repeating the extensive citations. Additional references will support and amplify their analyses.

(a) The guiding principle in interpreting the mining laws is the intent of Congress to encourage the exploration and development of minerals on public lands.

The purpose of the mining laws is to promote mineral development on public lands. An interpretation of the mining laws that would make it impossible to develop a rich mineral deposit on public lands (such as the Crown Jewel Mine) is clearly wrong. For most of the last 127 years, the law has been interpreted liberally to accomplish its purpose. Questions have been resolved in favor of accomplishing the purpose of the law. For instance, in an early case involving the question of whether corporations could be considered "citizens" entitled to own claims, the U.S. Supreme Court had little trouble interpreting the law generously. The Court said:

Many branches of mining and those which yield the largest returns, can be carried on only by deep excavations in the earth, and the use of powerful machinery, requiring expenditures generally far beyond the means of single individuals. In lode mining, especially, such excavations extend, in most cases, hundreds of feet, in many cases thousands of feet, into the earth, where, for successful working, the steam-engine of great power is as essential an instrument as the pick and the shovel. It was expected, of course, that mining would continue after the passage of the act as before. No change in that respect was needed or asked for. The object of the act of May 10, 1872, from which the provisions of section 2319 were carried into the Revised Statutes, was 'to promote the development of the mining resources of the United States.' It is so expressed in its title, and such development is sought to be promoted by indicating the manner in which claims to mines can be established, and their extent, and by offering a title to the original discoverer or locator who should develop the mine discovered and located, or to his assigns. . . . We think, therefore, that it would be a forced construction of the language of the section in question, if, because no special reference is made to corporations, a resort to that mode of uniting interests by different citizens was to be deemed prohibited. There is nothing in the nature of the grant or privilege conferred which would impose such a limitation. . . . The development of the mineral wealth of the country is promoted, instead of retarded, by allowing miners thus to unite their means. This is evident from the fact that so soon as individual miners find the necessity of obtaining powerful machinery to develop their mines, a corporation is formed by them, and it is well known that a very large portion of the patents for mining lands has been issued to corporations." *McKinley v. Wheeler*, 130 U.S. 630, 633 (1889).

Note how the U.S. Supreme Court, soon after passage of the mining law, refers to large-scale corporate mining beyond the means of individual miners with their picks and shovels. The court quickly concludes that Congress intended to facilitate such large corporate mining operations.

Yet the Solicitor, in his opinion, would have us believe that no large corporate mines existed that would require more than five acres of land ancillary to a lode claim in order to operate. This is clearly not the case. Many early mines had miles of workings. While miners did not always locate and purchase millsites to accommodate the large volumes of tailings generated, it was well understood that such tailings could be deposited on public lands outside the boundaries of the lode claims. *See Ritter v. Lynch*, 123 F. 930 (D. Nev.

1903), in which the federal court stated "'When a place of deposit for tailings is necessary for the fair working of a mine, there can be no doubt of the miner's right to appropriate such ground as may be reasonably necessary for this purpose, provided he does not interfere with pre-existing rights." (quoting *Jones v. Jackson*, 9 Cal. 237, 244 (1858).

In his treatise "Lindley on Mines," which discusses the implementation of the Mining Law of 1872 in the decades immediately after its passage, the author devotes significant space to the discussion of "blanket lodes" and other deposits such as copper porphyry deposits that are clearly larger than a single claim. It is obvious that tailings from such deposits fit neither on a single lode claim or on a single millsite. These sources should dispel the myth offered by the Solicitor and others that the Mining Law of 1872 was intended only for individual miners with picks and shovels and never contemplated volumes of tailings or overburden that would not fit on a single claim or millsite.

One hundred and twenty-seven years after its passage, the Forest Service Manual and the Bureau of Land Management (BLM) regulations and manuals properly reflect the expressed intent of the mining laws. Both agencies' manuals state unequivocally that there is no limit on the number of millsites that a miner may locate so long as they are needed to develop a valuable mineral deposit. Bureau of Land Management Handbook for Mineral Examiners H-3890-1, page III-8 (1989); Forest Service Manual, section 2811.33 (1990). Both agencies also acknowledge, in their regulations and manuals, the purpose of the mining laws. The Forest Service Manual provides:

2811.33 - Millsite Claims. A millsite claim may not exceed 5 acres and must be described by metes-and-bounds or by legal subdivisions. When nonmineral land not contiguous to a vein or lode is used or occupied by the proprietor of the vein or lode for mining or milling purposes, the nonadjacent surface ground may be included in an application for patent for such vein or lode (30 U.S.C. 42(a)).

Where nonmineral land is needed and used, or occupied by a proprietor of a placer claim for mining, milling, processing, beneficiation, or other operations in connection with such claim, the nonmineral land may be included in an application for patent for the placer claim (30 U.S.C. 42(b)). ***The number of millsites that may be legally located is based specifically on the need for mining or milling purposes, irrespective of the types or numbers of mining claims involved*** (30 U.S.C. 42 (emphasis added)).

2817.03 - Policy. . . . The regulations at 36 CFR Part 228, Subpart A shall be administered in a fair, reasonable, and consistent manner and not as a means of inhibiting or interfering with legitimate, well-planned mineral operations. . . . The statutory right of the public to prospect, develop, and mine valuable minerals and to obtain a patent shall be fully honored and protected. Proprietary information relating to those rights and obtained through the administration of the agency's mineral regulations shall be protected to the full extent authorized by law.

The BLM Handbook for Mineral Examiners provides that "any number of millsites may be located but each must be used in connection with the mining or milling operation." H-3890-1, ch. III § 8 (rel. 3/17/89).

The Solicitor's Opinion stands contrary to the purpose of the mining law and consistent past interpretation and practice, producing the absurd result that a rich gold deposit on public land cannot be mined. While the interpretation of a statute by the implementing agency is entitled to great deference by the courts, an abrupt change in long standing interpretations is not entitled to deference where it is contrary to the language and intent of the statute and upsets the settled expectations of miners who have relied on the law and have risked large sums of money on the development of mines. Lindley on Mines § 666.

(b) The mining law limits the *size* of lode, placer and millsite claims, not the *number* of claims any miner may locate.

The language limiting the ***dimensions*** of lode and placer claims is just as explicit as the millsite language, yet the agencies and the courts have uniformly held that there is no limit to the ***number*** of lode or placer claims that may be located by a citizen. Last Chance Mining Co. v Bunker Hill Co., 131 F. 579, 583, cert denied, 200 U.S. 617 (1904). The statutory language is nearly identical:

The lode statute states: "A mining claim located after [1872], whether located by one or more persons, may equal, but shall not exceed, one thousand five hundred feet in length along the vein or lode."

The placer statute states: "[N]o location of a placer claim hereafter made, shall exceed one hundred and sixty acres for any one person or association of persons."

The millsite statute states: "[N]o location hereafter made of such nonadjacent land shall exceed five acres."

Though the language is nearly identical, the Solicitor asserts that the last of these three should be interpreted differently, to mean only one millsite is allowed per lode claim. The Solicitor points to the phrase "nonmineral land, not contiguous to the vein or lode" and notes that the remaining references are to "the proprietor of such vein or lode" and "such nonadjacent land". From this he conjures a 1:1 ratio of millsites to lode ***claims***. However, the statute makes no reference to lode "claims" or "locations" but rather refers to the "vein or lode," i.e., the entire mineral deposit, whether covered by one or more claims. The Solicitor acknowledges that it is appropriate to have multiple millsites for an entire deposit, provided they are on nonmineral land and are necessary and used for operating the deposit. There is simply no basis in the language of the statute for the 1:1 ratio between millsites and lode ***claims***.

As stated by prior witnesses, including Mr. McCrum and Mr. Alfers, the Solicitor cites no decision of the Department of Interior or the courts holds that a millsite is invalid because more than one millsite per mining claim has been located. Such vague references as the Solicitor cites are *dicta* in cases decided on other grounds and are therefore not precedent for his assertion. As amply illustrated by Mr. McCrum, the decisions cited by the Solicitor focus on the need for and good faith occupation of millsites for mining purposes rather than any ratio of millsites to mining claims.

3. The Crown Jewel Decision, Instructional Memoranda and Proposed Rules Contain Additional Assertions and Policies Contrary to the Mining Laws.

The Solicitor and the Secretary of the Interior are attempting to reinterpret the mining laws so that they cannot be used, even in good faith by legitimate miners, to develop minerals on federal lands. The Solicitor's Opinion was but one step in that program, attempting to limit the space available for mine tailings and facilities to an unusable amount. The Solicitor and the Secretary, as well as the Secretary of Agriculture, have taken related actions to foreclose the possibility that federal land could be used for mining operations. Their new interpretation of the mining law suggests that neither mining claims nor surrounding federal land can be used for tailings and other facilities, creating a Catch-22. "Congratulations for finding a commercial mineral deposit on federal land - now try to figure out how to mine it without putting waste rock, tailings or facilities anywhere but right on top of the ore itself." Obviously this is an absurd result.

The Crown Jewel Decision refers to new Forest Service regulations asserting that no special use permits may be granted for placing solid waste (including mine tailings or overburden) on national forest lands. In the

Federal Register for November 30, 1998, new regulations for special use permits list as a new minimum requirement (36 C.F.R. § 251.54(e)(1)(ix)) that "the proposed use does not involve disposal of solid waste or disposal of radioactive or other hazardous substances." 63 Fed. Reg. 65950, 65965. This startling change, for the first time, denies the use of forest service land for mining operations unless specifically covered by a lode, placer or millsite claim. No explanation is given for this change. Where previously it has been universally acknowledged that the surface of national forests can be used for mining, the Forest Service would now limit placement of tailings and other facilities to the surface of mining claims and millsites alone.

Yet in the Crown Jewel Decision, the Solicitor also asserts that the surface of a lode claim cannot be used to support operations on another lode claim. This leads to the absurd conclusion that all mining operations must occur on a claim by claim basis. As shown by Mr. Alfers' testimony, there is no legal basis for this assertion as the laws clearly contemplate development of claims in groups. In *Smelting Co. v. Kemp*, 104 U.S. 636 (1881), the U.S. Supreme Court observed, "Everyone, at all familiar with our mineral regions, knows that the great majority of claims, whether on lodes or on placers, can be worked advantageously only by a combination among the miners, or by a consolidation of their claims through incorporated companies." *Id.* at 654. The Supreme Court recognized that groups of claims may be patented where work was done on some of the claims (expressly including a "flume to carry off the debris or waste material") and not on others. The BLM regulations regarding assessment work take the same approach, allowing work on one or more claims in a group to benefit the entire group. 43 C.F.R. § 3851.1(c). The arbitrary interpretation adopted by the Solicitor can be for no other purpose than to make the mining laws unusable.

The Forest Service, following the Solicitor's lead, circulated a draft memorandum suggesting that before approving any plan of operations, the validity of mining claims and millsites should be challenged. This sort of obstructionism has long been recognized as contrary to the mining laws and is contrary to the policy long reflected by the Forest Service's own manual. The mining laws are intended to encourage mineral exploration and development. Administration of the laws so as to frustrate the expectations of miners operating in good faith is clearly contrary to law.

After the date of the Solicitor's Opinion, the BLM issued instructional memoranda making the miner's right to use ancillary BLM lands discretionary with BLM managers. Instruction Memorandum No. 98-154 (to all state directors) dated August 17, 1998 provides:

Lands Open to the Operation of the Mining Law:

If the lands on which the mining plan of operation is proposed are open to the operation of the Mining Law and you determine that the plan does not unacceptably conflict with other significant resources within the plan area, e.g., cultural sites or properties or sacred sites, you need not evaluate the millsite-acreage-to-mining-claim ratio involved in the plan. When you approve a plan of operations under 43 CFR § 3809.1-6, the approval, in effect, serves as a surface use permit under section 302(b) of the FLPMA, as well as authorization under the Mining Law. To the extent the plan does not unacceptably conflict with other resources within the plan area, your plan approval under 3809 serves as a permit to use even those lands on which millsites are located in excess of the acreage limitation in the Mining Law.

If the lands on which the plan is proposed are open to the operation of the Mining Law but you determine that the operator's proposed plan would cause unacceptable resource conflicts, you must evaluate the mill-site-acreage-to-mining-claim ratio involved in the plan. By doing so, you will be able to exercise greater discretion to protect other resources by negotiating with the operator regarding the uses within the plan area

for millsite purposes.

This reduces the grant under the mining laws to "citizens may explore for and develop minerals on public lands if the land managers decide that mineral development is compatible with other values and uses for the land."

Most recently, on August 27, the BLM proposed amended regulations concerning the location and maintenance of mining claims. 64 Fed. Reg. 47023. In proposed 43 C.F.R. Part 3832, the BLM codifies the Solicitor's Opinion on millsites and takes it a step farther, indicating that no more than 5 acres of millsite may be claimed for each 20 acres of associated mining claims. This is no more supported by the statute than the millsite opinion itself.

4. Congress Should Reject the Solicitor's Revision of the Mining Law.

Why should Congress act now to stop the Secretaries and the Solicitor from nullifying the mining law? Why not wait for courts to address the legitimacy of the Solicitor's Opinion and new regulatory adventures?

First, the rights of citizens and their enormous investments are at stake. Millions of dollars have been spent by each of several mining companies in exploring and developing mineral deposits on federal land. They depend on the right to use federal land as long promised under the mining law. It is grossly unfair, after such expenditure, to wipe away their investments through an unfounded new interpretation of the mining law that denies use of federal land for mining operations. The Solicitor in his own testimony indicates that several hundred plans of operation are acted on by the BLM each year. Forcing these citizens to labor through expensive litigation for years and years to show that the Solicitor's actions are unlawful is just not fair. They have been invited by their government to invest their labor and scarce capital in the risky search for minerals; the government should not abuse their trust by arbitrarily retracting those rights.

Second, the Secretary of the Interior and the Solicitor have acknowledged that their actions are intended to reshape the mining laws because Congress has not acted to do so. *See* the comments of Senator Craig in the debate on H.R. 2466 (July 27, 1999). Senator Craig points out that before Mr. Leshy became Solicitor, he wrote a book about mining law reform and argued that in order to get Congress to act, a crisis would need to be created. Senator Craig quotes Mr. Leshy as saying (in 1988):

"Currently there is no genuine crisis involving hardrock mining but with a little effort crises sufficient to bring about reform might be imagined. . . . At the extreme, it might even be appropriate for the Interior Department and the courts to consciously reach results that make the statute unworkable."

In other words, since Mr. Leshy disagrees with the policy of the present mining laws, he believes it is appropriate to "consciously reach results that make the statute unworkable." It couldn't be made clearer that his intent is contrary to the law itself and that he is willfully misinterpreting the law to create a crisis. This is a nation of laws. Citizens should be able to rely on the laws Congress passes and not be subject to the whim of every government agent who may wish the law was different. That is why Congress should act swiftly to repudiate the Solicitor's Opinion.

As pointed out by a prior witness before this committee on August 3, Mr. Gerald Shaheen, every American requires almost 47,000 pounds of mined material per year. Our high tech society runs on minerals. The "Information Highway" is paved with minerals. Just as utility customers are increasingly being given the option to purchase "green power", our citizens and industries should have the option to use "green

minerals". Our country has federal and state environmental laws and regulations governing mining that are among the most sophisticated and stringent in the world. U.S. minerals are "green minerals." Surely, as the world's leading consumer of minerals, we can do our part to obtain minerals from our own lands in an environmentally responsible way. To borrow from a popular environmental slogan: Think Globally. Mine in the USA.

Thank you for this opportunity to testify in support of the hardrock mining industry.

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